

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Updating the Intercarrier Compensation Regime to)	WC Docket No. 18-155
Eliminate Access Arbitrage)	

COMMENTS OF TELIAX, INC.

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Table of Contents

I. Introduction	3
II. Summary of NPRM.....	5
III. Discussion.....	7
A. The Commission Must Recognize the Difference between Artificial Stimulation and Growth... 7	
1. Growth in the Toll Free Market is Substantial and Should not be Harmed by Short-Sighted Regulations.	8
2. There Is a Significant and Vibrant Wholesale 8YY Origination Market That Serves the Public Interest.....	10
B. While the Commission’s Proposal to Require Access Stimulating LECs Either to Accept Financial Responsibility for Calls Delivered to an IXC or to Accept a Direct Connection with the IXC is Reasonable, Reform Must Not Disrupt Toll Free Service.	11
C. Allowing IXCs to Select Their Affiliates for Mandatory Tandem Connections Will Weaken Competition in that Market.....	13
D. Access Stimulation Should Be Defined Narrowly or Market Distortions Will Occur.	14
E. The Commission Should Recognize Congressional Intent in this Rulemaking.....	15
F. The Commission Must End Self-Help by IXCs Because It is Negatively Impacting Legitimate Business Operations.	16
1. The FCC Needs to Recognize that Access Revenues Are Funding Major Investments by CLECs in IP Networks.	16
2. The Commission Needs to Expand This Proceeding to Include the Effect of Both Access Stimulation and Self-Help on Consumers and Regulate Both to Avoid Harming All End User Customers.....	17
IV. CONCLUSION	19

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I. INTRODUCTION

TeliAx, Inc. ("TeliAx"),¹ through its counsel, respectfully submits comments to the Federal Communications Commission ("Commission" or "FCC") in response to the Notice of Proposed Rulemaking in Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage (rel. June 5, 2018) ("NPRM").

While TeliAx welcomes the Commission's focus on arbitrage regulation, TeliAx urges the Commission to conduct an investigation grounded in market principles and facts. For too long, large carriers, such as AT&T and Verizon, have used the "arbitrage" label as a weapon against innovative, smaller competitive local exchange carriers ("CLECs"), refusing to pay valid tariffed charges by equating access charges with access stimulation and fraud. TeliAx specifically has fought against a campaign of self-help waged by both AT&T and Verizon by bringing collection actions against the two carriers.² AT&T and Verizon are pursuing a strategy wherein they believe that, if they repeat unsubstantiated, offensive claims of fraud enough times, their desired policies will become codified

¹ TeliAx is a competitive local exchange carrier ("CLEC") based in Denver, Colorado. The Company provides voice and data services to both retail and wholesale customers, including toll free (8YY) origination service. Through an affiliate, TeliAx also offers access to the Toll Free Exchange, a propriety platform that allows carriers and service providers to offer toll free calling services completely through IP transport, bypassing the unnecessary costs and technical limitations of the Public Switched Telephone Network ("PSTN").

² *TeliAx, Inc. v. AT&T Corp.*, No. 1:15-cv-01472-RBJ, Dkt. No. 68-1 (D. Colo.) (referred to the Commission on the basis of primary jurisdiction); *TeliAx, Inc. v. Verizon Services Corp.*, Civil Action No. 18-cv-00104-RM-MEH (D. Colo.); *TeliAx, Inc. v. MCI Communications Services, Inc.*, Civil Action No. 1:18-cv-01266-RM-MEH (D. Colo.).

rules. While Teliax condemns such self-help, it nonetheless welcomes this opportunity to inform the record about the Commission's current arbitrage rules and about any changes that are required.

Specifically, these comments provide the Commission with the following guidance with regard to any rulemaking on access stimulation and arbitrage:

1) Distinguish between artificial stimulation and valid growth in the number of calls and the minutes of use, especially in the area of toll free calling. Also, avoid interfering with the growth in toll free calling and use of 8YY resources.

2) Do not implement rules that could interfere with the wholesale 8YY origination market. Currently, the market serves the public interest by providing considerable choices to carriers and other service providers. Customers may switch wholesale providers, which can result in swings in the wholesale carrier's 8YY traffic volume but such swings in volume must not be mistaken for access stimulation.

3) Adopt rules that require access stimulating carriers to either (a) accept financial responsibility for calls delivered to interexchange carriers ("IXCs") or (b) accept a direct connection with an IXC or an indirect connection via a tandem provider selected by the IXC. Recognize that IXCs do not always accept direct connections with CLECs, as has been Teliax's experience soliciting direct connections with AT&T and Verizon. Importantly, Teliax and many other CLECs are ready to interconnect with large IXCs on an IP basis for the exchange of 8YY traffic but most IXCs continue to operate TDM (Time Division Multiplex) toll free networks and, therefore, cannot accept calls in IP format.

4) Prohibit IXCs from selecting their affiliates for mandatory tandem connections, which will weaken competition.

5) Define access stimulation narrowly to avoid market distortions. Recognize that in Section 254(g) of the Communications Act, 47 U.S.C. § 254(g), which requires national long distance rate-averaging for IXCs, Congress intentionally left room for some level of regulatory arbitrage.

6) Support CLEC investment in IP networks. Access revenues fund major investments by CLECs in IP networks. Accordingly, the Commission must balance the interests of all carriers and their customers, rather than concentrate on protecting the interests of AT&T, Verizon and their customers.

7) Expand this proceeding to investigate the effects of access stimulation and IXC self-help on consumers and regulate both to avoid harming all end user customers.

II. SUMMARY OF NPRM

The Commission's NPRM begins by recounting the FCC's 2011 efforts to reduce access stimulation, which the Commission regards as the "most widespread access arbitrage scheme."³ Based on the Commission's account, earlier efforts that resulted in Section 61.3(bbb)⁴ were at least partially successful, given that "access stimulators" have allegedly given up stimulation of terminating end office access and turned to other arrangements to maximize intercarrier compensation revenues.⁵

To further reduce regulatory arbitrage incentives,⁶ the FCC offers additional, possible rule changes. These include requiring the access-stimulating local exchange carrier ("LEC") either to: "(i) bear the financial responsibility for the delivery of terminating traffic to their end office, or functional equivalent, or; (ii) accept direct connections from either the IXC or an intermediate access provider

³ NPRM at ¶ 2.

⁴ 47 C.F.R. § 61.3(bbb) (defining "access stimulation" as occurring when (1) an LEC has a "revenue sharing agreement," which may be "express, implied, written or oral" that "over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment" by the LEC is "based on the billing or collection of access charges from interexchange carriers or wireless carriers;" and (2) the LEC meets one of two traffic tests. Either the access-stimulating LEC has "an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month, or has had more than a 100 percent growth in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year."); *see also* NPRM at ¶ 4. An access stimulator must reduce its rates to include its actual demand or to match those of the lowest price cap LEC in the state. *Id.* at ¶ 5.

⁵ For example, the routing of traffic through intermediate carriers not subject to 61.3(bbb), including Centralized Equal Access ("CEA") providers. NPRM at ¶¶ 6-7.

⁶ The Commission staff defined "regulatory arbitrage" as "profit-seeking behavior that can arise when a regulated firm is required to set different prices for products or services with a similar cost structure." Patrick DeGraba, "Bill and Keep at the Central Office as the Efficient Interconnection Regime" at 1 ¶ 2 n.3 (FCC, OPP Working Paper No. 33, Dec. 2000).

of the IXC's choice."⁷ As an alternative approach, the NPRM proposes the option to reduce "all terminating tandem switching, common transport, and tandem-switched transport rate elements for access stimulators to bill-and-keep [("B&K")]."⁸

The Commission also asks whether the existing rules work; whether there should be rules for intermediate switching and transport; and whether access stimulation in and of itself should be declared to be an unjust and unreasonable practice.⁹ The NPRM also inquires into other potential forms of arbitrage. These include routing IXC traffic bound to a Commercial Mobile Radio Service ("CMRS") provider through a tandem switch to generate access revenue.¹⁰ The Commission notes some LECs are changing their Point of Interconnection ("POI") in order to increase mileage (so-called "mileage pumping").¹¹ Next, the FCC discussed so-called "Daisy Chaining," where some carriers allegedly add unnecessary network facilities to call routing in order to increase access revenues.¹²

The NPRM continues to dig into market, financial and anti-competitive issues associated with potential further changes in the Commission's rules as they affect access stimulation. The Commission recognizes that customers (and presumably their serving LECs) with high volumes are not necessarily involved in traffic stimulation.¹³ In recognition of complexities, the NPRM asks several probing questions, including:

Are there efficiencies that are in the public's interest in what some describe as arbitrage? Would addressing the arbitrage described here unfairly advantage any particular competitor or class of competitors? If so, are there alternative means to address the arbitrage issues

⁷ NPRM at ¶ 9 (citations omitted).

⁸ *Id.* at ¶ 24 (citation omitted).

⁹ *Id.* at ¶¶ 26-27

¹⁰ *Id.* at ¶ 30.

¹¹ *Id.* at ¶ 31.

¹² *Id.* at ¶ 32.

¹³ *Id.* at ¶ 34 (citations omitted).

described here and presented in the record? How would the changes proposed herein affect small businesses? ¹⁴

Additionally, the NPRM seeks information on cost issues. It asks:

Are there additional, more-current data available to estimate the annual cost of arbitrage schemes to companies, long distance rate payers, and consumers in general? Likewise, are there data available to quantify the resources being diverted from infrastructure investment because of arbitrage schemes? To what degree are consumers indirectly affected by potentially inefficient networking and cost recovery due to current regulations and the exploitation of those regulations? Are there other costs or benefits we should consider?¹⁵

III. DISCUSSION

A. The Commission Must Recognize the Difference between Artificial Stimulation and Growth.

Teliix agrees that now is the right point in time for the Commission to re-examine its arbitrage rules and to make surgical changes where necessary. But before taking action, the Commission must remember there is a significant and important difference between artificial stimulation of traffic to take advantage of regulatory arbitrage and growth in traffic volumes due to other economic and business factors that naturally results in larger access bills from LECs to IXC. And, while it may be appropriate for the FCC to act to decrease the incentives for carriers to engage in regulatory arbitrage,¹⁶ it is not appropriate for the FCC to amend its rules solely for the benefit of AT&T and Verizon.

AT&T and Verizon, along with many other carriers, offer customers large bundles of domestic long distance minutes or unlimited calling plans (so-called "All-Distance Calling"). Offering large bundles of what would otherwise be individually billed toll calls to end user customers is a business

¹⁴ *Id.* (citations omitted).

¹⁵ *Id.* at ¶ 35 (citations omitted).

¹⁶ Interestingly, the Commission has not always found "regulatory arbitrage" to be detrimental to the telecommunications marketplace. The Commission received and rejected an argument to exclude from the definition of loops for unbundled network elements ("UNEs") lines used for high-capacity services (DS-1 and above) on the ground that "providing these [high-capacity] services to competitors at lower-than-tariffed rates would "promote regulatory arbitrage and serve no valid statutory or public purpose." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report & Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, at ¶ 177 (1999) (citing and rejecting the comments of US West). *Accord SBC Communications Inc. Section 271 Application*, 15 FCC Rcd 18354, at ¶ 182 (2000).

decision that deserves no protection under Commission rules. Access rules should not be distorted to enable AT&T and Verizon to ensure profitability for their retail calling packages. Instead, where rules are required, they should remain tailored to specific, substantiated harms that negatively impact consumers and competition.

1. Growth in the Toll Free Market is Substantial and Should not be Harmed by Short-Sighted Regulations.

It is critical for the Commission to protect and promote the growth of the toll free calling market. As the Commission recently noted in the 8YY Access Charge Reform Further Notice,¹⁷ the demand for 8YY numbers continues its rapid increase. There, the FCC stated:

We also note that, despite evidence of abuse, 8YY numbers continue to be in high demand. What factors explain this dynamic? It is our understanding that this growth in demand is at least partially due to businesses using 8YY numbers in new ways, such as call tracking to determine which advertisements generate the most responses.

Historical trends show the explosion in toll free calling in recent years. The original 800 Service Access Code ("SAC") opened in 1967 and was not supplemented until March 1, 1996 (29 years later) when the 888 SAC opened for use.¹⁸ Following the opening of the 877, 866, 855 and 844 SACs, the fifth subsequent SAC (833) opened in April 2017¹⁹ only some 21 years after the 888 SAC opened.

Somos, the neutral administrator of toll free numbers, wrote in its blog about several items of importance to understanding 8YY growth. Speaking of one such item, vanity numbers, Somos wrote "Thanks to their memorability, they generate 25-50% more inbound leads."²⁰ Somos' commentary continued, as follows:

We're seeing stronger and stronger demand for vanity numbers today, because the advertising landscape has become a lot more complicated and competitive. Despite some of the news we read and hear, broadcast radio, television and outdoor media channels are holding

¹⁷ *8YY Access Charge Reform*, Further Notice of Proposed Rulemaking, 83 Fed. Reg. 31099, at ¶ 196 (2018) (footnotes omitted) ("*8YY Access Charge Reform Further Notice*").

¹⁸ *Toll Free Service Access Codes*, Report & Order, 11 FCC Rcd 2496, at ¶ 1 (1996).

¹⁹ *Toll Free Service Access Codes*, Order, 66 Comm. Reg. (P&F) 825, at ¶ 2, n.2 (2017).

²⁰ See Somos, *Q&A with 800response* (Aug. 11, 2016), <https://www.somos.com/blog/qa-800response>.

their own against digital media channels. This means that it's critical for businesses to have a balanced blend of both digital and traditional channels to reach their customers at the many different touch points they're engaged with throughout the day.

Vanity Toll-Free Numbers are proven to work best – as far as generating inbound phone calls to advertisers – when they're used in traditional channels like television, radio, and out-of-home. At the end of the day, a memorable number will stick and build a cohesive brand when used across all advertising channels, within a business' advertising territory – online or offline.²¹

Next, Somos discussed call tracking that is available with toll free calling.

In the simplest of terms, call tracking measures the performance of a company's advertising and marketing strategy. At a top-level, the data on inbound calls will reveal response rates, calculate cost-per-lead, and measure the ROI of advertising campaigns. Going deeper, real-time call tracking tells businesses where their calls are coming from, and who their callers are.

On our platform, as soon as a call is completed, all of the data for that call is posted in our online tracking dashboard. Our customers are able to monitor the peaks and valleys of call traffic at a macro level, with access to the addresses and demographics of their callers. We also offer speech analytics services to provide an automated breakdown of what's being said on each call.

Being able to analyze the content of Toll-Free calls allows our customers to learn about what their callers are saying, and how their agents or employees are responding. They can get direct input about how competitive they are according to their customers, and understand if their agents are knowledgeable about their products and services, and how well they are handling customers' needs and the customer experience.²²

Toll free service is critical not only just to the telecommunications industry but also to businesses, government agencies, nonprofits and American consumers. The Commission needs to protect toll free calling from intended or unintended consequences of any rule or policy changes adopted herein.

²¹ *Id.*

²² *Id.*

2. There Is a Significant and Vibrant Wholesale 8YY Origination Market That Serves the Public Interest.

There is a significant and vibrant wholesale 8YY origination market that serves the public interest. A number of CLECs and over-the-top (“OTT”) VoIP providers have chosen to outsource handling of toll free calls to wholesale providers, such as Teliix. These companies send all or part of their end users’ toll free calls to a wholesale provider.²³ These partnerships arise for a variety of business, financial and engineering reasons, including to avoid the risks and costs of engaging in billing disputes and possible litigation with AT&T and Verizon.²⁴

The marketplace for wholesale provider services is competitive. CLECs or OTT VoIP operators may elect to partner with Teliix or Teliix’s competitors; and may, thereafter, move to a different wholesale provider. It is possible that when a wholesale provider’s volume jumps when it adds a new CLEC’s traffic, there is an appearance of stimulation. But ultimately, this business model does not involve stimulation or manipulation of the intercarrier compensation regime, and market forces dictate changes in wholesale 8YY providers’ traffic volumes.²⁵ Since this is NOT access stimulation, it cannot be regulated as such. To do so would discourage competition in the 8YY wholesale origination market.

²³ See Reply Comments of Teliix, Inc., *In re Connect America Fund*, WC Docket No. 10-90; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, at 14-15 (July 3, 2018) (“Teliix Reply Comments”).

²⁴ *Id.*

²⁵ For example, assume Teliix’s monthly volume of wholesale calls delivered to AT&T is 10 million minutes in May 2018. CLEC A, which has not been a Teliix wholesale partner, decides to move its AT&T-bound wholesale 8YY calls to Teliix from a competitor. Further assume that, in June 2018, CLEC A sends two million minutes of AT&T-bound toll free calls to Teliix for handling. To the casual but uniformed observer, it looks as if Teliix’s 20% increase in volume could be “stimulation.” But it is not; it is just a movement of calls from one wholesale competitor to Teliix. *Ceteris paribus*, the volume of AT&T-bound 8YY calls is the same between May and June 2018 even though one CLEC’s share of that total traffic increased and another CLEC’s share decreased.

B. While the Commission's Proposal to Require Access Stimulating LECs Either to Accept Financial Responsibility for Calls Delivered to an IXC or to Accept a Direct Connection with the IXC is Reasonable, Reform Must Not Disrupt Toll Free Service.

The Commission has proposed to eliminate incentives for access stimulation further by requiring LECs engaged in access stimulation to choose between accepting financial responsibility for its calls to an IXC or to accept direction interconnection with the IXC.²⁶ As a general matter, Teliax finds this proposal reasonable, because it protects IXC from the risk of excessive tandem switching and transport costs.²⁷ That said, Teliax urges the Commission to avoid implementing this reform in a way that would disrupt toll free service.

As an initial matter, we emphasize that IXCs are often not willing to connect directly with CLECs, despite past statements from Verizon and AT&T lobbyists.²⁸ As part of normal business discussions, Teliax has offered several times – to each carrier – to establish a direct connection for 8YY traffic, but both carriers have turned down or ignored the offers. This problem weighs against basing policy on the assumption that IXCs want and order direct interconnections.

Further, Teliax and many other CLECs stand ready to deliver their traffic in an IP format to IXCs in all situations. This includes toll free traffic. However, the toll free networks operated by most IXCs are TDM networks. For IXCs to accept and handle toll free calls, any IP calls must be converted to TDM by the last carrier in line (the CLEC on a direct connection or the tandem provider for an indirect connection). Therefore, a rule requiring CLECs to deliver toll free calls to IXCs in IP format would not work because many IXCs do not have IP-based toll free networks.

²⁶ NPRM at ¶ 10.

²⁷ The Commission must keep in mind that operators of tandem switches, as common carriers, must process and transport all calls they receive. And they do not originate any traffic. Further, if the Commission were to adopt a rule that allowed an IXC to require a direct interconnection with the access stimulating LEC or to select a tandem provider (presumably not its own affiliate to avoid the re-monopolization of intermediate switching and transport), *see* NPRM at ¶ 13, there is no reason for the Commission to adopt specific access stimulation rules for tandem operators.

²⁸ *See generally*, Comments of AT&T to Refresh the Record in WC Docket No. 10-90 and CC Docket No. 01-92, *passim* (filed Oct. 26, 2017); Comments of Verizon in WC Docket No. 10-90 and CC Docket No. 01-92, at 4, 6 (filed Oct. 26, 2017).

Just as the movement to B&K for terminating end office services has made the placement of robocalls less expensive and, therefore, more frequent²⁹ despite the efforts of the Commission and the Federal Trade Commission (“FTC”) to stamp-out robocalls, so too could the blanket application of B&K to all traffic that triggers a broadly written definition of “access stimulation” have unintended consequences. As explained above, there is a critical difference between access stimulation triggered by regulatory arbitrage and growth especially in the toll free market.

Toll free calling has worked successfully for more than 50 years because it is a called-party-pays system that encourages people to call toll free numbers. The service is so successful that even when many consumers have All-Distance Calling packages, many businesses, government agencies and nonprofits continue to pay premium reverse toll charges to receive toll free calls. If B&K were applied to 8YY calls, the Commission would be transforming toll free service into a partially toll free service, where end user customers would have to pay to dial an 8YY telephone number. That possibility would suppress toll free demand and undermine the value of toll free.

Moreover, absent a toll free calling surcharge on end user customers, either on a per-toll-free-call or monthly basis,³⁰ the costs for handling 8YY traffic would fall on LECs and OTT VoIP providers, which, in turn, would provide a strong incentive for those companies to stop providing toll free calling service involving TDM-based networks by filing Section 214 applications for discontinuance. LECs and OTT VoIP providers could still provide all IP-based 8YY calling on a RespOrg³¹ to RespOrg basis

²⁹ Youmail, a provider of cloud-based telecommunications services, including an app that blocks robocalls to phones, has tracked the volume of robocalls by month. For June 2015, an estimated 1.3 billion robocalls were placed. The number of robocalls in June 2018 has jumped to 4.1 billion. See <https://robocallindex.com/>. The Commission should direct its economists to study the correlation of moving terminating end office charges to B&K and the increase in robocalls and place the findings on public notice for comments before it adopts any more rule changes that move other access elements directly, or on a glide path, to B&K.

³⁰ Carriers remain free to file tariff provisions offering new rates or services over existing lines without first receiving Commission authorization. *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977); *AT&T v. FCC*, 487 F.2d 865, 870-881 (2nd Cir. 1973). This is the “carrier-initiated rates” doctrine that is embedded in the Act and was taken from the Interstate Commerce Act.

³¹ “RespOrg” or “Responsible Organization” is defined in Section 52.101(b) of the FCC’s rules. 47 C.F.R. § 52.101(b).

through such platforms as Teliix's Toll Free Exchange® that eliminate IXC transport in favor of Internet transport. But since not all RespOrgs or their customers use these IP-based platforms, some toll free subscribers would lose callers.

It bears repeating: any reform stemming from this proceeding must not be permitted to disrupt toll free service. Toll free calling must be treated differently than sent paid calling. If it is not, the public interest will be harmed.

C. Allowing IXCs to Select Their Affiliates for Mandatory Tandem Connections Will Weaken Competition in that Market.

As an alternative to an IXC's right to insist on direct interconnection with a stimulating LEC, the Commission proposes to allow the IXC to select a tandem provider, rather than allow the stimulating LEC to do so.³² Conceptually, this seems reasonable as there are situations where direct interconnection may not make economic sense. However, this proposal could also weaken the competitive tandem market if the Commission were to allow the IXC to select tandem interconnection through an affiliate. That would not serve the public interest.

Before the advent of Centralized Equal Access ("CEA") providers, the tandem switching and transport market was effectively controlled by the RBOCs and GTE.³³ Along with providing equal access on an affordable centralized basis and opening rural communities to long distance competition, the arrival of CEA providers also took traffic from the then monopoly RBOC and GTE tandem providers.

The opening of the local markets to competition thorough the 1996 Telecommunications Act³⁴ resulted in the entry of competitive tandem switch providers that offer alternatives to ILEC tandem services locally, regionally and even nationally. It is clear that the tandem market is quite competitive. But if AT&T and Verizon are permitted to choose tandem switching services provided by their ILEC

³² NPRM at ¶ 13.

³³ *Iowa Network Services, Inc. v. Qwest Corp.*, 385 F.Supp.2d 850 (S.D. Iowa, 2005); *In re Indiana Switch Access Division*, 1 FCC Rcd 634 (Nov. 14, 1986); *In re Iowa Network Access Division*, 3 FCC Rcd 1468 (Feb. 29, 1988).

³⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

affiliates, the competitive state of the tandem market will be dramatically weakened. The two biggest telecom companies must not be permitted to tie long distance calls, including toll free calls, to their own tandem switching services. The FCC should, therefore, prohibit an IXC selecting its preferred tandem provider to choose a tandem switch operated by one of its affiliates.

D. Access Stimulation Should Be Defined Narrowly or Market Distortions Will Occur.

The Commission asks whether it should revise the definition of access stimulation by “modify[ing] the ratios or triggers in the definition” or by removing the need for a revenue-sharing agreement.³⁵ Alternatively, the Commission suggests revenue-sharing alone could constitute access stimulation.

None of these approaches constitute good public policy. It is easy to distinguish between artificial access stimulation based on regulatory arbitrage and growth in volumes caused by many factors, including national or regional economic growth, substitution of telecom services for other services (such as business travel), the superiority of 8YY service to ordinary voice calls or market competition where a LEC or OTT VoIP provider decides to outsource its 8YY calls or to switch from one wholesale vendor to another. If the Commission were to tighten its ratios and triggers for access stimulation it would most certainly catch normal increases in traffic volumes in its access stimulation trap. That result would surely harm smaller LECs and OTT VoIP providers and provide a decidedly unwarranted and unusual regulatory incentive against economic growth.

Similarly, focusing on revenue-sharing alone will cause market distortions. In 2011, the Commission, in rejecting arguments to make revenue-sharing alone constitute access stimulation, stated: “A ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming.”³⁶ And, as Teliix explained in some detail in its

³⁵ NPRM at ¶ 26.

³⁶ *2011 Transformation Order*, at ¶ 672 (internal footnote omitted).

Comments and Reply Comments on CenturyLink's petition for declaratory ruling on the VoIP Symmetry Rule, revenue sharing is a feature of a robust wholesale market for 8YY origination service.³⁷

E. The Commission Should Recognize Congressional Intent in Deciding this Rulemaking.

Congress intended that some level of regulatory arbitrage exist when it enacted Section 254(g) of the Act.³⁸ This section requires "rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas" and "that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State." This law was passed in the face of vastly different access charges by LECs and other operating cost differences around the United States. Major cost differences include significant variances in customer density, terrain and climate and local and regional economic conditions. Congress clearly intended that carriers' profits would vary from call to call and from route to route while charging uniform rates. Inherent in the law is the Congressional recognition that there would be some regulatory arbitrage. Moreover, as cited earlier, the Commission has already held regulatory arbitrage is permissible in some situations.³⁹ The FCC needs to accept a reasonable level of regulatory arbitrage in the long distance market just as it did for high-capacity UNEs.

Of course, LECs should not be able to pick the pockets of IXCs due to economic oddities in the Commission's rules.⁴⁰ The FCC already addressed that issue in 2011. But LECs should be able to

³⁷ See Teliix Reply Comments, *supra* note 23, at 14-15; *see, generally*, Comments of Teliix, Inc., *In re Connect America Fund*, WC Docket No. 10-90; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (Jun. 18, 2018).

³⁸ 47 U.S.C. § 254(g).

³⁹ *See* n. 16 *supra*.

⁴⁰ For example, Section 61.39 of the FCC's rules, 47 C.F.R. § 61.39, allows small, rural LECs that are members of the National Exchange Carrier Association ("NECA") to use its actual costs, which tend to be high in amount, and historic demand to establish access rates. This rule has provided an incentive for some incumbent LECs ("ILECs") and the CLECs that concur in the former's rates to engage in access stimulation.

recover their operating expenses and investments used to deliver toll free traffic to and from IXCs. The Commission need not otherwise tweak its rules to keep the road smooth for AT&T and Verizon.

F. The Commission Must End Self-Help by IXCs Because It is Negatively Impacting Legitimate Business Operations.

1. The FCC Needs to Recognize that Access Revenues Are Funding Major Investments by CLECs in IP Networks.

The Commission properly worries about the effects of regulatory arbitrage and access stimulation on the ability of large carriers, including AT&T and Verizon, to invest in IP networks. But it cannot stop there. It must look at the effects on smaller carriers as well. CLECs cannot afford to upgrade their networks, many of which are IP-based now, without receiving some fair compensation for the use of those networks by IXCs and CMRS operators.

Teliix, for example, is a small, closely held corporation. It has neither institutional investors nor any long-term debt. It was built from the bottom-up, evolving from a provider of hosted PBX services to a CLEC, serving both retail and wholesale customers. Teliix has network facilities serving both Colorado LATAs from Denver and Colorado Springs. It also has operations in Dallas. Among other services, Teliix offers Ivy SoftwareSM, a proprietary, turnkey, private-label solution that enables resellers and integrators to sell both SIP trunks and Hosted PBX features to their customers. Ivy is unique in that the reseller is able to set prices and create plans while Ivy does all of the billing.

Teliix also offers the Toll Free ExchangeSM. This is a proprietary platform that serves RespOrgs, "by improving toll free call quality, enabling modern features, bringing the calling and called parties closer together, fighting fraud by improving data transparency, simplifying billing by allowing you to manage fewer vendors and rate combinations, cuts costs and increasing revenue at the same time."⁴¹ The Toll Free Exchange replaces IXC transport and mandatory TDM conversions with Internet transport and tariffs with negotiated agreements for the exchange of traffic.

⁴¹ See Toll Free Exchange, <https://tollfree.exchange>.

Absent intercarrier compensation, these innovative services would not exist. And absent some fair compensation going forward, further innovation will be stifled.

2. The Commission Needs to Expand This Proceeding to Include the Effect of Both Access Stimulation and Self-Help on Consumers and Regulate Both to Avoid Harming All End User Customers.

The Commission does not appear to have data demonstrating whether and by how much IXC savings from access reform (such as zeroing-out terminating end office access) has been actually passed through to customers. For example, by how much have AT&T and Verizon reduced rates for basic long distance calls, bundles of minutes or All-Distance Calling packages since the 2011 reforms became effective? Did most of the cost savings go to cross-subsidize other competitive services, such as Internet access or video programming? Will access reform savings enable AT&T to purchase Time Warner? The Commission needs to investigate these issues before it adopts new access charge rule changes.

AT&T and Verizon make countless claims that CLECs and OTT VoIP providers are engaging in access stimulation and even “fraud,” but they do not provide sufficient details such that the claims can be investigated. Meanwhile, Teliax (and likely other CLECs) have been told to deliver all calls to IXCs for completion even when they are labeled as “access stimulation” or “fraudulent.” This so-called access stimulation or fraud is often just an attempt to steal service or receive it at a price arbitrarily established by the IXC.⁴²

Just as the Commission worries that access stimulation increases the price for service for end user customers (seemingly those of AT&T and Verizon),⁴³ it should also concern itself with self-help or other schemes wherein IXCs stiff LECs on lawful access rates. Clearly, AT&T wants to avoid a

⁴² The support of an aggressive adoption of across-the-board B&K by AT&T and Verizon is especially ironic given their history of billing and collection tens of billions of dollars in interstate and intrastate access charges since 1984. It only stands to reason that neither company, which started as Southwestern Bell Telephone Company and Bell Atlantic respectively, could have acquired other LECs; built and acquired nationwide wireless carrier operations; and made huge purchases of non-regulated companies, many of which are in the content and entertainment industries, without decades of access charge revenues.

⁴³ See NPRM at ¶ 27.

situation where it is forced to pay additional access charges due to access stimulation, to avoid passing on the increase in costs to its customers. But what the Commission must understand is that when AT&T uses self-help to stop paying LEC invoices it deems “fraudulent,” its actions impact the LEC in the same way, forcing the LEC to increase the price of its services or reduce spending on innovation and new technology. If access stimulation needs to be regulated, so too must access avoidance through self-help.

The Commission should release a further NPRM and Notice of Inquiry in this matter that examines the role of AT&T and Verizon in scamming OTT VoIP providers and CLECs, as well as the effect of access reform cost savings on end user customers including the relationship of B&K to the increase in robocalls. This proceeding should include consideration of a proposed rule that would make “self-help” by a carrier withholding payment of tariff charges billed by another carrier an unjust and unreasonable act and, thus, unlawful unless the first carrier simultaneously files a formal complaint with the FCC or a lawsuit in federal court.⁴⁴

Teliax fully understands that the FCC does not have jurisdiction to hear a collection action by one carrier against another.⁴⁵ Teliax is not asking for such a rule. Rather, Teliax believes a carrier subject to another’s self-help incurs other costs/damages when a second carrier unilaterally decides whether or what to pay the first carrier in terms of intercarrier compensation. These include costs for attorneys, accountants, consultants, billing contractors and diverted management time. Those should be recoverable by the LEC. Similarly, it should be able to seek attorney fees in a federal lawsuit.⁴⁶

⁴⁴ See generally, *Peerless Network, Inc. v. MCI Comm’ns Serv., Inc.*, No. 14 C 7417, *slip op.* (N.D. Ill. March 16, 2018) and the cases cited therein.

⁴⁵ See *In re U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, 19 FCC Rcd 24552, 24555-556 ¶ 8 (2004); see, also, *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, 22 FCC Rcd 17973, 17984-985 ¶ 29 (2007).

⁴⁶ Section 206 of the Act, 47 U.S.C. § 2076.

IV. CONCLUSION

For the reasons set forth herein, Teliax urges the Commission to: 1) distinguish between artificial stimulation and growth, especially in the area of toll free calling and avoid rule revisions that would interfere with the growth in toll free calling and use of 8YY resources; 2) not create regulations that would interfere with the significant and vibrant wholesale 8YY origination market; 3) adopt rules that would require access stimulating carriers either to accept financial responsibility for calls delivered to IXC's or to accept a direct connection with such carriers; 4) prohibit IXC's from selecting their affiliates for mandatory tandem connections, which will weaken competition in that market; 5) recognize Congress intended that some level of regulatory arbitrage exist when it enacted Section 254(g), which requires national long distance rate-averaging for IXC's; and 6) recognize that access revenues are funding major investments by CLECs in IP networks. Finally, the Commission needs to expand this proceeding to include the effect of both access stimulation and self-help on consumers and regulate both to avoid harming all end user customers.

Respectfully submitted,
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